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IN THE

Supreme Court of the United States

October Term 1958
No. [redacted] 135

CHARLES JOHN FUNK,

Petitioner,

vs.

DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Arizona.

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IN THE

Supreme Court of the United States

May Term, 1968
No. .....

CHARLES JOHN FUNK,

Petitioner,

vs.

DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Arizona.

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Arizona in the above-entitled case on the 20th day of February, 1968.

Citations to Opinions Below.

The Arbitration Award is unreported and is printed in Appendix, *infra,* pp. 1-3. The dissenting opinion to the arbitration award is also unreported and is printed in Appendix, *infra,* pp. 22-34. The Judgment of the Superior Court of Maricopa County, State of Arizona is also unreported, and is printed in Appendix *infra,* pp. 35-38. The Opinion of the Court of Appeals (Division I) State of Arizona, is printed in Appendix *infra,* pp. 39-48, and is reported in 434 P. 2d 529, and

6 Arizona Appeals 527. The opinion of the Supreme Court of the State of Arizona is unreported and was the denial of a Petition for Review of the decision of the Court of Appeals (Division I) State of Arizona.

Jurisdiction.

The Arbitration Award was entered on the 19th day of June, 1963, Appendix, pp. 4-12, *infra*. The Judgment of the Superior Court of the State of Arizona, Maricopa County, was entered on the 28th day of October, 1964, Appendix, pp. 35-38, *infra*. The Judgment of the Court of Appeals (Division I) of the State of Arizona, was entered on the 4th day of December, 1967, Appendix, pp. 39-48, *infra*. Rehearing was denied on the 5th day of January, 1968. Petition for Review to the Supreme Court of the State of Arizona was denied on the 20th day of February, 1968. The jurisdiction of this Court is invoked under *28 U.S.C. Section 1254(1)*.

Question Presented.

Whether a partnership Arbitration Award which determines the value of partnership assets can also additionally forcibly require a litigant to sell his separate admitted non-partnership property to the remaining partners?

Statement.

An arbitration proceeding was commenced based upon a partnership agreement which specified that the departing partner's share of the assets of the partnership would be purchased by the remaining partners for a price determined by three (3) Arbitrators Appendix pp. 13-21, *infra*. The partnership agreement specified

what the partnership property consisted of 47,500 Shares of Western Racing Inc. stock and four dog racing Management contracts. At the commence of the arbitration proceeding the remaining partners refused to go through with the prearranged partnership agreed arbitration proceeding unless a further submission stipulated was executed by the parties to the arbitration. The further submission stipulated read as follows:

> "September 17, 1962
>
> It is stipulated that evidence shall be introduced before the arbitrators; that upon a majority of the arbitrators submitting a written award, such award shall be filed in Charles John Funk, Plaintiff, vs. David K. Funk, Arthur L. Funk and Albert C. Funk, defendants, No. 129497, in the Superior Court of the State of Arizona in and for the County of Maricopa and shall have the same force and effect as though entered by a judge of said Superior Court; said judgment shall be signed by a Superior Court judge and all parties hereto waive their right to a new trial or appeal to any court."

During the proceeding all the evidence adduced that Charles John Funk owned separately and not involved in the partnership an interest in certain Greyhound Parks of Arizona stocks and bonds, along with a separate and non-partnership interest in certain Washington Land Corporation stock. These stocks and bonds were admitted by all litigants to be non-partnership asset. This was Charles John Funk's separate property.

The arbitrators in their award required Charles John Funk to sell his non-partnership and separate assets, namely, Greyhound Parks of Arizona stocks

and bonds and Washington Land Corporation stock, to the remaining partners in spite of the fact that no evidence existed or was introduced in the entire proceeding that these Greyhound Parks of Arizona Stocks and bonds and Washington Land Company stock was a part of the partnership assets. The trial court, on a Petition to Modify the Arbitrators' Award, struck the requirement that the departing partner sell his separate and non-partnership Greyhound Parks of Arizona stocks and bonds, and Washington Land Company stock from the arbitrators' award.

The Court of Appeals (Division I) of the State of Arizona reversed the trial court's decision and ordered Charles John Funk to sell his separate and non-partnership stocks and bonds of Greyhound Parks of Arizona and separate and non-partnership stock in Washington Land Company to the remaining partners by reinstating the entire arbitration award.

On rehearing, the Court of Appeals (Division I) of the State of Arizona denied the same.

On Petition for Review to the Supreme Court of the State of Arizona, the Petition for Review was denied.

Reason for Granting Writ.

1. The Decision of the Court of Appeals (Division I) of the State of Arizona, in *Funk v. Funk,* 434 P. 2d 529, 6 Arizona App. 527, applying what it considered to be sound arbitration law, required the Appellant herein to dispose of his non-partnership assets which were clearly outside of the Submission Agreement. This conflicts with the "due process" and "obligation of contracts" provision of the United States Constitution.

2. Clearly, the question presented is of importance in the administration of arbitration proceedings which have pervaded our country today and which are a vehicle which is making substantial inroad into court delays. The settlement of the question by this Court is plainly in the public interest since it is likely to arise in many arbitration proceedings, including the hundreds now pending before the American Arbitration Association, which has offices throughout the country.

3. The Decision of the court below is believed to be erroneous. Moreover, the decision below properly conflicts with applicable decisions of this Court. It is generally agreed that this court recently recognized, in *Dombrowski v. Eastland,* ..... U.S. ....., 18 L. Ed. 2d 577, 87 S. Ct. ..... (1967) that individual property rights are still entitled to constitutional protection.

Conclusion.

For the foregoing reason, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ALAN PHILIP BAYHAM,
HENRY L. ZALUT, and
LEVEN B. FERRIN,
By LEVEN B. FERRIN,
Attorneys for Petitioner.

Dated this 17th day of May, 1968.

APPENDIX.

Arbitration Award.

Majority Report of Arbitrators.

To the Honorable Superior Court of the State of Arizona, in and for the County of Maricopa:

The undersigned majority of the arbitrators appointed in connection with this action, report as follows:

I

The parties to this action agreed to submit to arbitration the matters complained about in plaintiff's complaint filed herein, and other general matters of disagreement arising from a partnership agreement entered into between said parties on or about September 12, 1957, creating a partnership under the firm name of WESTERN GREYHOUND RACING CIRCUIT to conduct dog racing and horse racing in Arizona and elsewhere and to engage in other activities.

II

Disagreements arose between the partner Charles John Funk and his remaining partners, David K. Funk, Arthur L. Funk and Albert C. Funk, in the conduct of the partnership business, which eventually led to the filing of the above entitled action.

III

The matters of disagreement could not by resolved by the partners themselves and as a result they agreed to submit them to arbitration and thereupon H. L. Dunham, C. G. Sullivan and W. T. Elsing, residents of

Phoenix, Arizona, were selected as arbitrators to consider and resolve the questions in dispute between the partners, to fix the interest of Charles John Funk in the partnership venture and to make an award of that interest to Charles John Funk. A copy of the partnership agreement is attached to the arbitrators' award, both of which are attached hereto.

IV

During the course of the hearings by the arbitrators, the following written stipulation was entered into and signed by all the parties and their attorneys:

"Sept. 17, 1962

It is stipulated that evidence shall be introduced before the arbitrators; that upon a majority of the arbitrators submitting a written award, such award shall be filed in Charles John Funk, plaintiff, v. David K. Funk, Arthur L. Funk, and Albert C. Funk, defendants, No. 129497 in the Superior Court of the State of Arizona in and for the County of Maricopa and shall have the same force and effect as though entered by a judge of said Superior Court; said judgment shall be signed by a Superior Court judge and all parties hereto waive their right to a new trial or appeal to any court."

V

This report is signed by H. L. Dunham and C. G. Sullivan, who constitute a majority of the arbitrators selected. They are informed that arbitrator W. T. Elsing will file a dissenting minority report.

VI

Pursuant to the stipulation of the parties and their attorneys which is copied in paragraph IV, and the law in such cases made and provided, it is respectfully prayed by the majority of the undersigned arbitrators as follows:

1. That this report, and the award attached thereto, together with said partnership agreement attached to the award, be filed with the Clerk of this Court, and made a part of the record in this action.

2. That pursuant to said stipulation, and the law in such cases made and provided, the undersigned majority of the arbitrators respectfully request this Honorable Court to make and enter its judgment herein confirming in all respects the award of said arbitrators attached hereto.

Respectfully submitted.

/s/ H. L. Dunham
H. L. DUNHAM
/s/ C. G. Sullivan
C. G. SULLIVAN
MAJORITY OF ARBITRATORS

Arbitration Award.

Per H. L. DUNHAM and C. G. SULLIVAN, W. T. ELSING dissenting.

The arbitrators in this matter are Messrs. H. L. Dunham, C. G. Sullivan and W. T. Elsing. The opposing parties are Charles John Funk on the one hand and David K. Funk, Arthur L. Funk and Albert C. Funk on the other. For convenience they will be characterized herein by their first names. Charles is represented by Alan P. Bayham, attorney at law. David, Arthur and Albert were represented by Paul H. Primock, attorney at law and are now represented by Leslie C. Hardy, attorney at law.

The basis for the arbitration arises out of paragraphs 20, 21 and 23 of a Copartnership Agreement of Western Greyhound Racing Circuit dated Setptember, 1957, entered into by the parties hereto. It was probably executed about the twelfth day of that month. Those paragraphs read:

> "20. In the event that any one of said parties shall desire to withdraw from said partnership during the time hereinbefore mentioned, he shall offer his interest for sale to the remaining partners and each of the parties hereto agree that they will never sell their interest to any third party. The remaining partners agree that they will purchase the share of the withdrawing partner for the fair value of such interest.
>
> "21. In the event said parties cannot agree on what is the fair value of the retiring partner's interest, then the retiring partner shall select one individual as an appraiser and the remaining part-

ners shall select one party as an appraiser, and the two appraisers shall select a third party as an appraiser. The value of the selling partner's interest fixed by said appraisers, or any two of them, shall determine the purchase price. All parties agree to be bound by such decision of the appraisers. In addidtion to the purchase price to be determined by the appraisers, the length of time for the payment of said purchase price shall also be determined by the said appraisers and all parties agree to be bound by such decision of the appraisers.

"23. It is further understood and agreed between the parties hereto that each of said parties do hereby waive and relinquish any rights they may now have or hereafter acquire for the filing of a law suit (sic) against any of the remaining partners. Should any difference of opinion, money or anything of value arise that cannot be settled by agreement between the partners, then said partners shall agree to each appoint an arbitrator and both arbitrators shall appoint a third arbitrator who will render a decision on the dispute and said decision shall be binding upon all parties hereto. The clause of waiving their right to sue shall not apply if the basis of the cause of action or law suit (sic) is upon fraudulent acts of one of the partners. 'Fraudulent act' is defined to mean not only dishonestly (sic), but also in the normal, legal definition of the word 'fraud'."

A copy of the partnership agreement in full is attached hereto as Exhibit A.

Differences of opinion arose between Charles and the other partners; and Charles elected to exercise his rights

under the above quoted provisions of the partnership agreement; hence, this arbitration.

Hearings were held on September 17, 18, 19, 20 and 21; on October 22 and 23, 1962, and on January 23, 1963. During the course of the hearings, the following stipulation was entered into, signed by all the parties and their then attorneys:

"Sept. 17, 1962

It is stipulated that evidence shall be introduced before the arbitrators; that upon a majority of the arbitrators' submitting a written award, such award shall be filed in Charles John Funk, plaintiff, v. David K. Funk, Arthur L. Funk, and Albert C. Funk, defendants, No. 129497 in the Superior Court of the State of Arizona in and for the County of Maricipa and shall have the same force and effect as though entered by a judge of said Superior Court; said judgment shall be signed by a Superior Court judge and all parties hereto waive their right to a new trial or appeal to any court."

Oral and documentary evidence was introduced and the matter was submitted on briefs filed by respective counsel. Charles subsequently filed a petition requesting a further hearing on the ground of changes in circumstances occurring after the hearing and because of newly discovered evidence. This was denied by the arbitrators, subject to the right of the arbitrators to submit written interrogatories to the parties should the arbitrators wish so to do.

The execution of the partnership agreement had been preceded by litigation between Charles, one Maurice O. Funk and Bernard J. Funk as plaintiffs against Arthur

individually and as executor of the estate of Benjamin A. Funk, deceased, and David as defendants. The action was dismissed with prejudice on October 31, 1957. The consideration for the dismissal was the execution by Arthur and David of certain Bills of Sale and the creation of the partnership.

The Bill of Sale signed by David, dated September ....., 1957, reads in effect that he conveys to Charles:

> "Twelve and one-half (12½%) per cent interest in all stock of which he is record holder as of September 12, 1957 of Greyhound Parks of Arizona, Inc.
>
> "Twelve and one-half (12½%) per cent interest in all stock of which he is record holder as of September 12, 1957 of Washington Land Co, Inc.
>
> "Twelve and one-half (12½%) per cent interest in all debenture bonds of which he is record holder as of September 12, 1957 of Greyhound Parks of Arizona, Inc.
>
> "It is understood by both parties that said assets are now pledged as security for certain loans and that said transfer shall be made immediately upon the redempion of said assets."

A Bill of Sale reading the same as the above was executed by Arthur.

Arthur and David strongly contend that in view of the provisions of the paragraphs of the partnership agreement quoted above, this Board should determine the value of the securities conveyed by the Bills of Sale and award a money judgment to Charles based on such valuation. Charles, with equal emphasis, contends that he is entitled to the shares of stock and bonds in kind and cannot be compelled to accept money in lieu of them.

It is the judgment of the majority of this Board that under the Partnership Agreement and the Stipulation set forth above that we do have the power to make an award of a money judgment based on the values of the securities described in the bills of sale. We believe that it is to the best interest of all the parties to do so as the failure to do so could well cause dissention (sic) and possible further litigation which none of the parties desire.

The bills of sale recite that Charles is entitled to a 12½% interest in the securities issued to David and to Arthur. Charles contends that it was the intent of the parties to convey to him a 25% interest in the securities held by David and a 25% interest in the securities held by Arthur. We hold to the contrary as we believe we are bound by the rule that the documents speak for themselves.

In regard to values the evidence indicates that the stock in Greyhound Parks of Arizona, Inc. has a valuation of $3.50 per share. We place a value of $30,111.92 on Charles interest therein. The value of the bonds of Greyhound Parks of Arizona, Inc. owned jointly by the parties is $81,000.00, making Charles interest of a value of $10,125.00. Interest and principal returned on those bonds during the period between the formation of the partnership and December 31, 1961 (the latter date, in our opinion, being the date of dissolution of the partnership) was $86,610.00. Charles share of this is $10,826.25.

Charles 12½% interest in the shares of stock of Washington Land Co., Inc. we find to be $19,296.99.

We conclude that Charles should be awarded $70,300.16 for his equity in the securities covered by the

bills of sale. In view of this portion of the award, he is hereby divested of any claims in the foregoing securities which he may otherwise have acquired under the bills of sale.

In addition to the foregoing, it is incumbent upon us to make an award for the value of Charles' interest in the partnership agreement. Under the partnership agreement the assets of the partnership consists of the amount the partnership was entitled under management contracts, being an amount equal to ½ of 1% of the first $5,000,000 of pari mutuel (sic) handle) 1½% of the pari mutuel (sic) handle between $5,000,000 and $10,000,000 and 1% in excess of $10,000,000. In addition to this, the partnership was to receive $36,000 a year from Greyhound Parks of Arizona, Inc. plus 15% of the excess of $30,000 profits in Greyhound Parks before depreciation and amortization costs on certain bonds. Salaries at the rate of $23,125.00 per annum to Arthur are a part of the partnership. In addition to these sums David and Arthur were entitled as further compensation, 7½% each for all net income of Greyhound Parks of Arizona in excess of $300,000 per annum, which amount was to be computed before depreciation, interest on bonds and all state and federal excise and income taxes. This, also, was a partnershp asset.

Mr. Arthur Kent Colby testified that he believed a projection of profits for a ten year period and discounting the total sums which might be received by the partnership by 30%, gives Western Greyhound Racing Circuit, the partnership, a value of *$1,860,000.* Since the partnership agreement provides that Arthur, David and Albert C. Funk are entitled to salaries during the ten year period, such salaries should be deducted from Mr. Colby's over-all figure. We believe that $102,500 per

year is a fair total salary for Arthur, David and Albert. In addition there will be approximately $20,000 a year for miscellaneous expenses and interest to be paid out in the amound (sic) of $240,000. This reduces the value of the Circuit to $595,000. Charles one-fourth interest would amount to $148,750. At the date of dissolution of the partnership, the partnership owed Sport Services, Inc. $181,000 plus interest and Martha Collier $66,000.00, which includes interest of which Charles owed 25% of the foregoing.

Charles has an overdraft of $50,819.73 of Circuit funds as of December 31, 1961, which is a credit to the Circuit.

Charles has been paid by the Circuit beginning in December, 1961 by letter agreement $29,224.00 which is a credit to the Circuit.

As will be noted from the Partnership Agreement, the partnership owned 47,461 shares of stock of Western Greyhound Racing, Inc. We find that Charles' interest in this is $6,748.05.

After giving due consideration to necessary expenses other than salaries, including such items as interest, financing expenses and miscellaneous items about which we cannot be certain at the present, it is our considered judgment that Charles' interest in the partnership and the bills of sale has a total value of $109,595.67 as of the date of this award.

In closing this portion of our opinion, we should note that the evidence shows that in the action mentioned in the stipulation, the prayer for relief, among other things, directs that the court award Charles the value of the securities described in the Bills of Sale rather than for the shares of stock. As pointed out, he is now ask-

ing that his shares of stocks and debentures be awarded to him in kind. We accept the position set forth in the prayer of his complaint.

In order to fully cover the entire dispute among the parties we further adjudge that Albert, Arthur and David are to indemnify and save harmless Charles from any liabilities heretofore incurred by Western Greyhound Racing Circuit and its predecessors and will further indemnify and hold him harmless from any obligations which may be incurred by the Circuit or its successors in the future.

In regard to the jewelry store referred to in paragraph 26 of the Partnership agreement, with the consent of the parties, we award it to Arthur who is to assume all the obligations connected with it and who is to indemnify and hold Charles harmless from any such obligations.

We also adjudge that Charles shall indemnify and hold harmless the Circuit, Albert, David and Arthur from all liabilities which may have been or may in the future be incurred by him.

The provisions in the Arbitration Agreement permit us to fix the time and manner of payment. We adjudge that the Circuit is to make a flat payment of $15,000 forthwith to Charles, and thereafter the sum of $300.00 per week, without interest, until the balance of the award has been paid.

From the payment of June 3, 1963 to Charles, Charles shall pay to Conn & Candlin $662.50. This sum may be paid by the Circuit directly to Conn & Candlin. He is also out of the payment of June 3rd to pay one-half of the fees of H. L. Dunham. It has been directed by Mr. Dunham that Charles' share of

this expense, amounting to $600 shall be paid as follows: $300 to the Hospital Development Association, care of Taylor Smith, Manager of the Valley National Bank at Youngstown (sic), Arizona; $50.00 to St. Vincent de Paul Dining Room, 119 South 19th Avenue, Phoenix, Arizona; $100.00 to the Salvation Army Welfare Fund at Phoenix, Arizona; and $150.00 to the United Fund, 1515 East Osborn Road, Phoenix, Arizona. These sums may be paid directly by the Circuit.

Dated this 19th day of June, 1963.

/s/ H. L. Dunham
H. L. Dunham
/s/ C. G. SULLIVAN
C. G. Sullivan

State of Arizona, County of Maricopa—ss.

The foregoing instrument was acknowledged before me by H. L. DUNHAM this 19th day of June, 1963.

/s/ Maxine F. Crutcher (nee) Woods
Notary Public

(Seal)

My commission expires:

(Stamp) My Commission Expires Dec. 12, 1964

State of Arizona, County of Maricopa—ss.

The foregoing instrument was acknowledged before me by C. G. SULLIVAN this 19th day of *June,* 1963.

/s/ Theda M. Reardon
Notary Public

My commission expires:

Oct. 9, 1966

(Attached to the foregoing document is Exhibit A, a typewritten copy of Copartnership Agreement of Western Greyhound Racing Circuit, dated September, 1957, which reads as follows:)

EXHIBIT A.

COPARTNERSHIP AGREEMENT
OF
WESTERN GREYHOUND RACING CIRCUIT

THIS AGREEMENT, made and entered into this ..... day of September, 1957, by and between DAVID K. FUNK, ARTHUR L. FUNK, CHARLES JOHN FUNK and ALBERT C. FUNK,

WITNESSETH:

In consideration of the mutual covenants and mutual promises contained herein, and of the mutual and reciprocal considerations herein expressed, the parties hereto agree as follows:

1. To form a partnership under the firm name of WESTERN GREYHOUND RACING CIRCUIT to conduct the business of dog racing and horse racing and any other type of business that the parties hereinafter mutually determine to engage in.

2. Said partnership is to begin on the 1st day of September, 1957, and to continue for a term of twenty-five (25) years from that date.

3. It is further agreed between all of the parties hereto that the assets of said copartnership consist of management contracts to operate dog racing with Greyhound Parks of Arizona, Inc. and Western Greyhound Racing, Inc., and 47,461 shares of stock in Western Greyhound Racing, Inc.

4. It is further understood and agreed that of the 47,461 shares mentioned herein, 35,500 shares are now deposited with General Investment Company of New York as security for a loan, and 10,000 shares of stock have been loaned to General Investment Company of Arizona, Inc., pursuant to an agreement signed by all of the partners hereto.

5. It is further understood and agreed that the debts of the copartnership consist of the following:

(a) Eighty Thousand ($80,000) Dollars to repurchase the stock in Greyhound Parks of Arizona, Inc. (not a partnership asset).

(b) Ten Thousand ($10,000) Dollars plus interest due Philip Shaiman of Denver, Colorado.

(c) Five Thousand ($5,000) Dollars plus interest due Marvin Hayutin.

(d) Two Thousand Five Hundred ($2,500) Dollars due General Investment of New York. (This is in addition to the loan and the stock heretofore mentioned).

(e) Fifty Thousand ($50,000) Dollars plus interest due Martha Collier, Phoenix, Arizona.

(f) Seventeen Thousand Five Hundred ($17,500) Dollars due the Valley National Bank for bonds of Greyhound Parks of Arizona, Inc. (not a co-partnership asset).

(g) Six Thousand ($6,000) Dollars to L. Freeland and Margaret Lowthian.

6. It is agreed between all of the partners hereto that the first moneys earned by said copartnership, with the exception of reasonable salaries as hereinafter mentioned, shall be used to retire all of the above mentioned indebtedness, plus any and all other current bills now owed by Western Greyhound Racing Circuit, whether due or past due.

7. It is further agreed between the parties hereto that for a period of one (1) year from date hereof, unless changed by written instrument, each of the parties shall draw the following salaries:

(a) David K. Funk	$50,000 per year
(b) Arthur L. Funk	$37,500 per year
(c) Charles John Funk	$25,000 per year
(d) Albert C. Funk	$15,000 per year

8. If for any reason the copartnership does not have sufficient income to pay the above mentioned salaries, then each partner shall draw his proportionate share of the moneys available in proportion and in accordance with the salaries above mentioned. The balance, if any, of said salary unpaid shall be waived during each individual year and not be carried forward as a liability of the copartnership.

9. It is understood and agreed by all of the partners hereto that only a reasonable salary is intended to be

drawn by each of the partners until the above mentioned indebtedness has been paid, in full. After three (3) years from date hereof, by vote of the majority of the co-partners, the salaries may be adjusted to raise or lower said salaries in accordance with the financial condition and financial income of the co-partnership at that time.

10. It is further agreed between all of the parties hereto that three of the four copartners mentioned herein can, at any time, demand that the copartnership be incorporated and shares of stock issued equally between the four.

11. It is further understood and agreed between the parties hereto that each party shall own an undivided twenty-five (25%) percent interest in said corporation.

12. It is further understood and agreed that any and all racing contracts which may hereafter be secured either in the form of lease, purchase or management contract by any of the four partners hereto shall become an asset of and belong to the co-partnership.

13. It is further understood and agreed that any and all salaries received by the co-partners from any race track shall be immediately deposited in the checking account of Western Greyhound Racing Circuit for its disbursement.

14. It is further understood and agreed that a comptroller, to be named by three of the four copartners, shall be appointed and said comptroller shall be the only one authorized to issue checks on the checking account of the co-partnership.

15. Accurate books of account of the business transactions and affairs of said partnership shall be

kept, and said books shall be audited by an independent certified public accountant at least once a year, the first audit to be one year from date of this partnership agreement, unless all parties consent that said audit shall be omitted, and an audit may be made at any time that three of the four partners insist upon it; the expense of said audit whenever held, shall be paid from the partnership fund.

16. Each of the parties hereto agrees to give his sole and individual attention to the partnership business and not to engage in any other business whatsoever, without the consent of all other partners expressed in writing.

17. Each of the parties hereto agrees that he will not sign or endorse any promissory note whereby he becomes obligated to pay the debt of another, nor will he become surety or guarantor or otherwise pledge his credit or become obligated by reason of a default of another or to pay the debt of another.

18. If a difference of opinion should arise among the partners on any question relating to the management or any other phase of the partnership business the decision of three of the four partners shall be controlling and binding on all of the partners; and no partner shall intentionally do any act in relation thereto contrary to such decision.

19. It is understood and agreed that all partners shall consult and confer with the other partners before taking any steps resulting in any substantial change in the operation or policy of the partnership affairs, or in the sale of any portion of the partnership assets, or in any manner affecting the partnership business as

judged by the ordinary operation of said partnership business.

20. In the event that any one of said parties shall desire to witdraw from said partnership during the time hereinbefore mentioned, he shall offer his interest for sale to the remaining partners and each of the parties hereto agree that they will never sell their interest to any third party. The remaining partners agree that they will purchase the share of the withdrawing partner for the fair value of such interest.

21. In the event said parties cannot agree on what is the fair value of the retiring partner's interest, then the retiring partner shall select one individual as an appraiser and the remaining partners shall select one party as an appraiser, and the two appraisers shall select a third party as an appraiser. The value of the selling partner's interest fixed by said appraisers, or any two of them, shall determine the purchase price. All parties agree to be bound bv such decision of the appraiser. In addition to the purchase price to be determined by the appraisers, the length of time for the payment of said purchase price shall also be determined by the said appraisers and all parties agree to be bound by such decision of the appraisers.

22. It is further agreed that the method of purchasing a retiring partner's interest, as hereinabove mentioned, shall apply in the event of the death of one of the partners, and in that event the personal representative of the deceased and the remaining partners, if they are unable to arrive at a fair value, shall appoint the appraisers who shall decide the price and terms of payment on said agreed price.

23. It is further understood and agreed between the parties hereto that each of said parties do hereby waive and relinquish any rights they may now have or hereafter acquire for the filing of a lawsuit against any of the remaining partners. Should any difference of opinion, money or anything or value arise that cannot be settled by agreement between the partners, then said partners shall agree to each appoint an arbitrator and both arbitrators shall appoint a third arbitrator who will render a decision on the dispute and said decision shall be binding upon all parties hereto. The cause of waiving their right to sue shall not apply if the basis of the cause of action or lawsuit is upon fraudulent acts of one of the partners. "Fraudulent act" is defined to mean not only dishonesty, but also in the normal, legal definition of the word "fraud".

24. It is further understood and agreed that each partner shall be reimbursed for his actual expenses incurred while engaged in some phase of business for the copartnership. A weekly expense sheet with receipts, invoices and bills, whenever possible, shall be presented to the comptroller each and every week. Should the partner fail to submit said expense sheet within thirty (30) days from date, it is incurred, then said partner shall have waived his right for the return of said expenses and shall be unable to recover said expenses from the copartnership.

25. It is further understood and agreed that none of the partners shall be delinquent in their federal or state income taxes, nor become delinquent in their personal bills incurred by the individual partner. Should said partner fail to clear up any such delinquency within sixty (60) days from date of delinquency, the comptrol-

ler is authorized to pay said bills and deduct the amount so paid from any salaries due or which may become due from the individual partner.

26. It is further understood and agreed that Arthur L. Funk and Charles John Funk shall, within forty-five (45) days from date hereof, liquidate the jewelry store they are now operating at the Westward Ho Hotel, Phoenix, Arizona. The money so received from the sale of the assets of said jewelry store shall be turned over to Paul H. Primock, with a list of all outstanding indebtedness of said jewelry store. Paul H. Primock is then authorized to pay the moneys proportionately to the creditors, and the balance, if any, due said creditors shall be assumed by and paid by the copartnership. The payment of said balance by the copartnership shall not be construed as a salary or a withdrawal by Arthur L. Funk and Charles John Funk.

27. It is further understood and agreed that after the total indebtedness of the copartnership has been paid in full, the copartnership shall first then pay the full salaries as heretofore outlined, to the partners, and the surplus or balance, if there be any, shall be divided equally between the four partners.

28. Each partner shall, on every reasonable request, give to the other partners a true account of all transactions relating to the business and partnership and full information of all letters, accounts, writings and other things which shall come into his hands or to his knowledge concerning the business of the partnership.

29. In case, at any time or times hereinafter it shall appear to the said partners that this agreement or any covenant, stipulation, clauses or things herein

contained are in any way defective or are not expressed with sufficient clearness to be safely acted upon and any alteration therein or addition thereto shall be advised by an attorney, they, the said partners will then enter into, execute and perfect all further deeds, assurances or changes in this agreement as such attorney shall advise.

30. This agreement shall be binding upon the heirs, executors, administrators and assigns of each of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first above written.

.....

DAVID K. FUNK

.....

ARTHUR L. FUNK

.....

CHARLES JOHN FUNK

.....

ALBERT C. FUNK

EXHIBIT A

(FILED: July 1, 1963)

Dissent to Arbitration Award.

The Funk Arbitration.

W. T. Elsing, dissenting:

I respectfully dissent from the arbitration award entered by the majority of the Board, dated June 19, 1963; and, in my opinion it is void as being contrary to the laws and the facts. It seems that the very purpose of arbitration—to avoid litigation in the courts—was defeated by the arbitrary action of the majority of the Board. Basically, this arose from the animosity between the parties. On the one side was Charles John Funk; on the other side were David K. Funk, Arthur C. (sic) Funk, and Albert Funk. They will be designated by their first names, as in the majority opinion.

The record shows that on a previous occasion, an arbitration proceeding was initiated under the terms of the Partnership Agreement dated the ..... day of September, 1957. David, Arthur and Albert ignored it and refused to abide by the award. After an action was instituted in the Superior Court for Maricopa County, David and Arthur then consented to the present arbitration.

The hearings were not held in conformity with the judicial standards safeguarding the rights of a party in a court of law or equity; for as a condition precedent to the hearings, David, Arthur and Albert insisted that they would not proceed with the matter if Charles were in the same room with them during the taking of testimony. As a matter of expediency, and under the duress of such demands, Charles had no practical alternative but to concede. There was a decided conflict in the evidence presented by Charles and David, Arthur and Al-

bert. Some of the testimony of the latter two was in direct conflict with written records which were not impeached. Had Charles had the opportunity to confront these witnesses and to confer with his counsel during their interrogation, the outcome of the award of the majority would probably have been fairer to Charles' contentions.

During the course of the hearings, David, Arthur, and Albert, through their attorney, Mr. Paul H. Primock, now deceased, stated that they would not go on with the arbitration unless Charles signed the stipulation, dated September 17, 1962, and set forth on page 3 of the majority report. The majority of arbitrators construed this as meaning that they had the authority to direct Charles to dispose of his own separate property in which David and Arthur had no interest and to vest it in David and Arthur. It is the firm opinion of this arbitrator that such action by the majority was capricious, arbitrary and violative of the "due process" and "obligation of contracts" provisions of the United States and Arizona Constitutions.

It is realized that generally the procedure before boards of arbitration is more informal than in regular court proceedings relative to the admission of evidence and like matters. However, in fundamentals of the law of property, arbitrators cannot legally deprive a person of his goods unless there is a lawful reason for such taking. Unless there is a contract to that effect, arbitrators are not vested with power of eminent domain. It is submitted that the majority of the board assumed that power and, in effect, entered an award condemning Charles' property.

The property involved consisted of stocks and bonds in Greyhound Parks of Arizona, Inc.; and stock in Washington Land Company, Inc. The Partnership Agreement expressly recites that the assets of the partnership consist of (1) contracts to operate dog racing and (2) 47,461 shares of stock in Western Greyhound Racing, Inc. The other securities are not partnership assets—no more so than Charles' clothing or his books or his pictures.

The majority of the Board justified their attempt to transfer title to the securities on their belief that "it is to the best interest of all parties to do so as the failure to do so could well cause dissension and possible further litigation which none of the parties desire." What is "best" for individuals under circumstances like these, should not be the concern of a legally constituted tribunal. It constitutes an encroachment on the sacred rights of life, liberty and property. It reminds one of a totalitarian dictatorship and no court should give it sanctity.

The majority of the Board further seeks to bolster its award in this regard by pointing out that in an action pending before this Court, Charles prayed for the type of relief which the majority awarded him. It is submitted that a prayer in a complaint (subsequently amended), to which no answer was filed, cannot justify the Board of Arbitrators from entering an illegal award.

The powers of the arbitrators is (sic) delineated by the Partnership Agreement. That agreement presented one real issue: What is the value of Charles' interest in the partnership? We have no right to vest ourselves with any additional authority. This we attempted to do, and for that reason, I cannot accept the conclusion of my brother arbitrators.

To substantiate the position of Arthur and David, we would necessarily have to find that the stocks and bonds were partnership assets. This we cannot do. The Partnership Agreement, in paragraph 3, recites;

> "It is further agreed between all of the parties hereto that the assets of said copartnership consist of management contracts to operate dog racing with Greyhound Parks of Arizona, Inc. and Western Greyhound Racing, Inc., and 47,461 shares of stock in Western Greyhound Racing, Inc."

Paragraph 5(a) of the Partnership Agreement expressly provides that stock in Greyhound Parks of Arizona, Inc. is not a partnership asset.

There does not appear to be any evidence which contradicts the foregoing and, in fact, the positive evidence supports the position of Charles, he originally prayed for relief different than what he seeks here; but we are bound to do our duty as specified in the partnership agreement and in the manner which the evidence introduced here guides us. We cannot make a contract for the parties. A judicial or quasi-judicial body morally should not and legally cannot create a statuts quo which does not exist. What we might think is a more provident agreement (and to use a cliché, one's hindsight is better than his foresight) does not endow us with the power to say that some six years ago the parties should have entered into an arrangement different than the one they did enter into. It well may be that if the scrivener of the partnership agreement had put in a clause to the effect that the parties could buy out the stock interests of a retiring partner, Charles might not have signed it or, on the other hand, David or Arthur or Albert might not have signed it. The only way that the results wished

for by David and Arthur could be accomplished would be to find that through mutual mistake, as the law knows, it did not express the true intent of the parties. There is no such evidence. There was no "mutual mistake". The bills of sale signed by Arthur and David vested title (subject to a pledge) in Charles. Had the parties intended these to be partnership assets the Bills would have been to the partnership divesting Arthur and David of their interest and investing that interest in the partnership. This was not done and as arbitrators we are helpless to do it for them.

It is strenuously argued by Arthur and David that if Charles is to retain his interest in the shares and bonds referred to in the bills of sale he may create further litigation as a minority stockholder and that the objective of this arbitration consequently will be defeated. It is also said by Arthur and David that if we decree that Charles retains his ownership in the aforementioned shares of stock and bonds, Arthur and David will institute litigation. This we cannot prevent. Our judicial system is such that the courts are open to those who believe they are legally oppressed—whether or not they are. The purpose of arbitration, as counsel for the opposing parties know, is that our determination of this controversy (sic) under the stipulation and agreement for arbitration have a binding effect unless we as a board have abused our discretion or performed acts beyond our powers.

In concluding this part of my dissent, it should be noted that both David and Arthur agreed that the securities referred to were not assets of the partnership.

I must also dissent in regard to the valuation put upon Charles' interest in the partnership. Valuation is

largely a question of fact, but I believe that the majority of the Board abused their discretion. The evidence, it is true, was conflicting. On the one hand, David and Arthur testified to a low value; on the other hand, Charles set a high value. All these witnesses were obviously biased. They are not expert appraisers and their testimony was admissible only on the ground that they were owners. Only one appraiser qualified as an expert was called: Albert Colby. He did not feel justified in projecting the worth of Charles' interest in the partnership for a period of longer than ten years as he believed that beyond that term his opinion would be speculative. His conclusion was that the present market value of Charles' interest in the partnership, discounted to its present worth, was $494,375.00. (To this should be added $6,784.05, which is the value placed on the stock of Western Greyhound Racing, Inc.) The majority accepted this as a gross figure, but reduced it to a net of less than $40,000.00. This discrepancy is so enormous, that it cannot be reconciled. Admittedly, some rationalizations can be made on both sides; but it seems that the majority of the Board, after accepting Colby's figure, undertook to substitute its judgment of accounting principles. For example, Colby discounted his overall figures on the value of the partnership by 30%, to represent the present worth of Charles' interest. It would therefor follow that, if future salaries are to be deducted from the valuation, they, too, should be discounted by 30%. This was not done. The figure of $102,500.00 used by the majority as a fair salary for Arthur, David and Albert in their calculations on page 6 of the majority opinion is the exact amount set forth in paragraph 7 of the partnership agreement. Also set out in paragraph 7 is Charles' salary at $25,-

000.00, which he will be deprived of for many years. And this raises the question as to whether any future expenses and salaries should be deducted, as the majority of the Board did. The point can be best raised by this analogy: suppose A and B each own a half interest in an apartment house. A proposes to B that A purchase B's interest at one-half the fair market value. An expert appraiser fixes that value at X dollars. B then concedes to the correctness of that figure but says, "Now you must reduce the value by the amount of the costs of repairs for the life of the building and by the amount of salaries I will have to pay over that period." The two are not compatible. The majority erroneously adopted the latter view.

The testimony regarding the worth of the management contracts (including salaries to be turned into the partnership) varied from zero to $2,825,000.00, the latter being a supposition of what the partnership would earn over a period of ten years. Obviously, in most contracts where personal services are involved, one must take into consideration the facts of the possible deaths of the participants, changes in the laws regarding the activities conducted, the state's right of eminent domain which might destroy a business without compensation for intangibles—even wars which might curtail amusement ventures. On the other hand, despite these speculations, management contracts do have a value.

Unfortunately, I could not get a great deal of help from the accountants appointed by the arbitrators—Conn and Candlin nor from the report of DeMarcus, the accountant for Charles. These accountants are all highly competent. But the records from which they worked do not appear to have been kept in accordance

with approved bookkeeping methods, nor in accordance with the partnership agreement. Conn and Candlin expressly noted that they were required to accept all figures as they found them. DeMarcus found that the partnership records were not in a condition that would permit audit; that the income tax returns were poorly kept and only partially complete; and "Due to the haphazard nature of record-keeping for the partnership, large items of income were completely ignored insofar as entry on the books was concerned." Although the attorney, Paul H. Primock, for David, Arthur and Albert asked that the comptroller cooperate fully with the accountants, it is believed that such cooperation was not forthcoming.

The partnership agreement provides that accurate books of account of the business transactions and affairs of said partnership shall be kept, and said books shall be audited by an independent certified public accountant at least once a year . . . unless all parties consent that said audit shall be omitted. Apparently, the accounts have never been audited and there was no showing that this omission was acceded to. The agreement also provides that a weekly expense sheet with receipts, invoices and bills, whenever possible, shall be presented to the comptroller each and every week; and that for failure so to do within 30 days, the partner whose duty it was to submit such data, abandoned his right to be reimbursed. It appears that all the partners waived this provision by their conduct. The point is made, however, to indicate that the accountants' reports are by no means conclusive as to the value of the partnership assets.

Relative to the testimony of the comptroller for the Circuit, Paul Maasen (sic), I feel that because of inconsistencies in what he said, we should disregard it in toto. For example, he admitted that he had prepared financial statements for David and Arthur which did not correctly reveal the truth; that David and Arthur "ballooned" their assets but, in effect, it was all right because the statements were not used. Subsequent testimony, to which we must give credence, by John T. Brentano, an officer of the First National Bank of Arizona, was to the effect that the statements, signed by David and Arthur, were submitted to the bank apparently for the purpose of their obtaining a loan. The testimony of Mr. Brentano and Mr. Maasen (sic) in this regard cannot be reconciled. The significant point is that if Mr. Maasen (sic) would make incorrect entries for a national bank, there is a doubt cast on the correctness of his bookkeeping for the partnership. He obviously was biased in favor of David and Arthur and showed a prejudice against Charles—which may well have caused him to have the partnership books reflect a nonexistent picture. Both David and Arthur were evasive regarding the truth of the financial statements. Neither denied the testimony of Mr. Brentano and both, in fact, stated that their own financial statements were not worthy of belief. The testimony of David and Arthur was to the effect that they had never represented that the stock of Greyhound Parks of Arizona, Inc. was worth more than $3.50 but their signed statements submitted to the bank showed its value to be greatly in excess of that figure.

Under the management contracts, the partnership was entitled to one-half of 1% of the first $5,000,000.00 of

pari mutuel (sic) handle; 1½% of the pari mutuel (sic) handle between $5,000,000.00 and $10,000,000.00 and 1% in excess of $10,000,000.00. In addition to this, the partnership was to receive $36,000.00 a year from Greyhound Parks of Arizona, Inc., plus $5% of the excess of $30,000.00 profits in Greyhound Parks before depreciation and amortization costs on certain bonds.

To repeat, the only person who can be considered to be an expert appraiser was Albert B. Colby. He estimated the management fees and the income from Greyhound Parks, projecting it over a period of ten years, to be $2,825,000.00. Charles' share of this for a ten-year period would be $706,250.00. Since the contracts had a life of some 25 years, I do not believe that a ten year projection is unreasonable. There was no evidence as to the age of the parties, but we can assume that the life expectancy of the parties is in excess of the ten-year period.

Greyhound Parks of Arizona, Inc. had a pari mutuel (sic) handle for the 1961-62 season in Phoenix of $9,323,322.00. In Tucson the same company had a pari mutuel (sic) handle of $8,440,103.00. In regard to Greyhound Parks, we do not have figures as to how much of the pari mutuel (sic) handle resulted in a profit. The increase in the pari mutuel (sic) take in Arizona is increasing approximately 12% per annum.

If it is conceded that the arbitrators were invested with jurisdiction to transfer Charles' title to the bonds and stocks which were not partnership assets, I believe that the Bills of Sale should be reformed to show the true intent of the parties; i.e., they should be made to read that Charles was assigned a 25% interest instead of a 12½% interest.

It is true that ordinarily "an instrument speaks for itself." But an instrument can be reformed under the legal doctrine of mutuality of mistake. Let us review the evidence. On the one hand, Charles testified that he was to receive a 25% interest. This was disputed by David and Arthur. At the time of the preparation of the Bills, the scrivener of the documents was acting for Charles, David and Arthur. Subsequently Mr. Primock wrote letters to the three, dated July 23, 1959, stating in part:

> "It has also been called to my attention by Mr. (Charles) John Funk that in making out the Bill of Sale from David Funk to (Charles) John Funk, and Arthur Funk to (Charles) John Funk that I made an error in the figures. At the time it was understood that (Charles) John Funk was to have 25% interest in the stocks and bonds of Greyhound Park and the stock of Washington Land Company. Instead of preparing it that way, for some reason unknown to me, I only gave (Charles) John Funk 12½% instead of the 25% interest.
>
> "I am writing this at this time to notify all of you that new Bill of Sales (sic) should be prepares . . .".

As Paul Primock, counsel for David and Arthur contended, the letter does not necessarily bind them. However, it is extremely persuasive that the interest should have been 25% instead of 12½%, for it comes from a source who, when he wrote the Bills was acting in an

impartial capacity. That the scrivener, Paul Primock, made a mistake (i.e., that the conveyance of a 12½% from David and a like per cent from Arthur would give Charles a 25% interest in the whole) is fortified by the agreement dated the ..... day of May, 1952 between Charles and Arthur relating to Funk Jewelry Store, which agreement is attached to Charles' "Petition for Additional One Half Day Further Hearing Before January 1, 1962 (sic)."

Arthur testified that on receipt of the letter of July 23, 1959, he threw it in the waste basket. This sounds incredible. David testified that some time after the receipt of the letter, he told Charles when the two were in New York, that Charles had only a 12½% interest. This Charles denied. The Certified Public Accountant, Cecil A. DeMarcus, testified that when he examined, and had examined, the partnership books he made inquiries of Mr. Paul Maasen (sic), and was led by Mr. Maasen (sic) to believe that Charles' equity was 25%. The attorney at the hearing who represented David and Arthur was the same attorney who prepared the Bills of Sale. He was called on to testify but refused to do so. It is presumed that had he testified he would have told the truth. His refusal indicates to me that his statements would have been damaging to his clients. I conclude from all the evidence that it was the intent of the parties that Charles was to have a 25% interest in the securities referred to in the Bills of Sale.

The unfairness of the award is further illustrated by the fact that Charles is to be paid in instalments (sic) without interest, whereas the value of the equity of the other partners is figured with interest.

Although normally arbitration proceedings are laudable and serve an extremely useful purpose, it is felt by the writer in this dissenting opinion that the majority exercised powers far beyond their jurisdiction, and that Charles was not afforded the rights which a participant in arbitration proceedings is entitled to.

Dated, December 6, 1963.

/s/ W. T. Elsing
W. T. Eslsing

(Title of Action)

Judgment on Arbitration Award.

That this matter came on regularly before the Court upon the plaintiff, CHARLES JOHN FUNK'S motion to vacate or modify the award of the majority arbitrators (sic), and upon the defendants, DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK'S motion for judgment on award of the majority arbitrators, and

WHEREAS, by the terms of that certain partnership agreement entered into by the plaintiff and defendants in September, 1957, they agreed to submit disagreements of the partners to arbitration; and

WHEREAS, pursuant to said partnership agreement, CHARLES JOHN FUNK, gave notice to arbitrate and appointed W. T. Elsing to act as arbitrator and the defendants, DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK, appointed C. G. Sullivan to act as arbitrator, and these arbitrators then appointed H. L. Dunham as the third arbitrator; and

WHEREAS, arbitration proceedings commenced pursuant to the following stipulation:

"Sept. 17, 1962

It is stipulated that evidence shall be introduced before the arbitrators; that upon a majority of the arbitrators submitting a written award, such award shall be filed in Charles John Funk, plaintiff, v. David K. Funk, Arthur L. Funk, and Albert C. Funk, defendants, No. 129497 in the Superior Court of the State of Arizona in and for the County of Maricopa and shall have the same force and

effect as though entered by a judge of said Superior Court; said judgment shall be signed by a Superior Court judge and all parties hereto waive t heir (sic) right to a new trail (sic) or appeal to any court."

AND, WHEREAS, the arbitrators took evidence and have submitted their majority award signed by C. G. Sullivan and H. L. Dunham, and a Dissent to Arbitration Award having been filed by W. T. Elsing, and

WHEREAS, the plaintiff and defendant's (sic) motion being argued to the Court by memorandum and oral arguments and the Court being fully advised in the premises:

[WLMc]

~~The Court finds as follows:~~

IT IS ORDERED, that the plaintiff, CHARLES JOHN FUNK have judgment against the defendants, DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK, as follows:

That the majority award of the arbitrators is hereby modified by striking therefrom the consideration of the individual as distinguished from partnership property of CHARLES JOHN FUNK consisting of the stocks in Greyhound Parks of Arizona, Inc., Washington Land Company, Inc., and Bonds of Greyhound Parks of Arizona, Inc.

That the majority award in all other respects is confirmed.

That CHARLES JOHN FUNK have judgment against DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK in the sum of Thirty Nine Thou-

sand Two Hundred Ninety Five and 51/100 ($39,295.51) Dollars less advance payments on the anticipated award and pursuant thereto on behalf of CHARLES JOHN FUNK, to Conn and Candlin, Accountants, H. L. Dunham and/or Three Hundred ($300.00) Dollars to the Hospital Development Association, Fifty ($50.00) Dollars to St. Vincent de Paul Dining Room, One Hundred ($100.00) Dollars to the Salvation Army, One Hundred Fifty ($150.00) Dollars to the United Fund, and pursuant to the letter agreement of December, 1961 whereby the defendants agreed to pay to CHARLES JOHN FUNK Three Thousand ($3,000.00) Dollars and thereafter Three Hundred ($300.00) Dollars per week.

That the balance of said judgment shall be paid as follows:

A flat payment of Fifteen Thousand ($15,000.00) Dollars forthwith and thereafter the sum of Three Hundred ($300.00) Dollars per week until paid without interest, less advance payments heretofore made.

IT IS FURTHER ORDERED that the following creditors having claims in the amounts opposite their names have liens against any sums remaining due after ~~creditors~~ [WLMc] for advance payments made by defendant, and this recitation without prejudice to any named creditors claims to priority over any other named creditor:

Alan P. Bayham—Attorney	$12,000.00
Lester L. Penterman—Attorney	4,809.70
W. T. Elsing—Arbitrator	4,500.00
Stuckey Insurance Agency—Bond	100.00
Albert Colby Appraiser	500.00
Cecil De Marcus Accountant	5,950.00

IT IS FURTHER ORDERED that CHARLES JOHN FUNK'S interest in the co-partnership, known as Western Greyhound Racing Circuit, is terminated as of December 31, 1961.

DONE IN OPEN COURT THIS 28th day of October, 1964.

/s/ Warren L. McCarthy
JUDGE

DISAPPROVED AS TO FORM:
/s/ John H. Killingsworth

(in pen) Effectively entered
on November 6, 1964
Vol. 915, pages 256-
258, inclusive)

Opinion of the Court of Appeals of the State of Arizona (Division I).

David K. Funk, Arthur L. Funk and Albert C. Funk, Appellants and Cross-Appellees, v. Charles John Funk, Appellee and Cross-Appellant. No. 1 CA-Civ 122.

Court of Appeals of Arizona. Dec. 4, 1967.

Appeal and cross appeal from judgment of the Superior Court of Maricopa County, Cause No. 129497, Warren L. McCarthy, J., modifying an award and judgment thereon of a selected board of arbitration which, according to a partnership agreement of the parties, was to set a value on partnership assets of one of partners. The Court of Appeals, Hathaway, C. J., held that in absence of showing of fraud, it was error for trial court to modify award and judgment thereon where, by stipulation, and by partnership agreement, the parties had given the board of arbitration authority to decide all matters submitted to it and had provided that their award should have the same force and effect as though entered by a judge of the superior court.

Judgment modified and arbitration award and judgment thereon vacated and original judgment on award affirmed.

O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, by John H. Killingsworth, Phoenix, for appellants and cross-appellees.

Alan P. Bayham, Phoenix, for appellee and cross-appellant.

HATHAWAY, Chief Judge.

This is an appeal by David K. Funk, Arthur L. Funk and Albert C. Funk, defendants below, and a cross

appeal by Charles John Funk. The appeal is taken from the October 28, 1964, judgment of the superior court of Maricopa County modifying an award and judgment thereon of a selected board of arbitration which, according to the partnership agreement of the parties, was to set a value on the partnership assets of Charles John Funk.

On September 12, 1957, David K. Funk, Arthur L. Funk and Albert C. Funk, appellants, and Charles John Funk, appellee, entered into a partnership agreement providing for a partnership to be known as the Western Greyhound Racing Circuit. The execution of this partnership agreement arose out of prior litigation between Maurice O. Funk and Bernard J. Funk against David K. Funk and Arthur L. Funk, individually and as executor of the estate of Benjamin A. Funk, deceased. This action was dismissed with prejudice on October 23, 1957. The consideration for the dismissal was the execution by the two appellants, David and Arthur Funk, of certain Bills of Sale and the creation of the partnership. As a result of this arrangement, the appellee was voluntarily brought into Greyhound Parks of Arizona, Inc., and Washington Land Company by transferring to him shares of stock owned by Arthur and David Funk. In addition, appellee received debenture bonds of Greyhound Parks of Arizona, Inc., which were owned by Arthur and David Funk. These stocks and bonds were transferred under the Bills of Sale above mentioned. All of the foregoing corporations were to be owned and operated by Western Greyhound Racing Circuit, the newly organized partnership.

The partnership agreement provided that in the event of dissolution the withdrawing partner must of-

fer his interest in the partnership for sale to the remaining partners who promised to purchase such interest. It further provided:

> "23. It is further understood and agreed between the parties hereto that each of said parties do hereby waive and relinquish any rights they may have or hereafter acquire for the filing of a lawsuit against any of the remaining partners. Should any difference of opinion, money or anything of value arise that cannot be settled by agreement between the partners, then said partners shall agree to each appoint an arbitrator and both arbitrators shall appoint a third arbitrator who will render a decision on the dispute and said decision shall be binding upon all partners hereto. The clause of waiving the right to sue shall not apply if the basis of the cause of action or lawsuit is upon fraudulent acts of one of the partners. 'Fraudulent act' is defined to mean not only dishonest, but also in the normal, legal definition of the word 'fraud'."

Disputes arose among the partners and as a result thereof appellee filed suit on August 11, 1961, praying, in the alternative, that the defendants should be ordered to show cause "why they should not be required to arbitrate in the manner provided in said partnership agreement," or that the defendants shall be ordered to show cause "why the court should not appoint an arbitrator and appraiser to act with plaintiff's arbitrator and appraiser * * * to fix the value in sales price of Charles John Funk's" interest in both the partnership and the stocks and debenture bonds of the related business activities in which the appellee was one-quarter owner with the appellants.

Prior to trial, however, both sides agreed to abide by the partnership agreement and to appoint appraisers and arbitrators to dispose of the disputes. At the outset of the arbitration proceedings a long and trying discussion arose among the partners as to what was to be the subject matter of the arbitration. This discussion centered around the issue of whether the stock and bond interest of the appellee would be subject to the arbitration. After much further discussion on this matter the partners entered into the following stipulation of September 17, 1962:

> "It is stipulated that evidence shall be produced before the arbitrators; that upon a marjority of the arbitrators submitting a written award, such award shall be filed in Charles John Funk, plaintiff, v. David K. Funk, Arthur L. Funk, and Albert C. Funk, defendants, No. 129497 in the Superior Court of the State of Arizona in and for the County of Maricopa and shall have the same force and effect as though entered by a judge of said Superior Court; said judgment shall be signed by a Superior Court judge and all parties hereto waive their right to a new trial or appeal to any court."

Thereafter, evidence on all the matters prayed for in the appellee's complaint, including the value of the stocks and bonds, was introduced before the board. The board's award was entered and filed in the superior court of Maricopa County. The appellee moved to vacate or modify the award on August 1, 1963, which motion the superior court granted and entered its judgment[1] modifying the arbitrators' award, as above stated, on October 28, 1964.

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[1]"That the majority award of the arbitrators is hereby modified by striking therefrom the consideration of the individual as dis-

The single issue presented by the appellants is whether it was error, in the absence of a showing of fraud, for the trial court to modify the arbitration agreement in the light of the foregoing partnership agreement and the stipulation of September 17, 1962.

This not being a statutory arbitration under A.R.S. § 12-1501 through § 12-1511, it necessarily follows that the validity or invalidity of the award must be founded upon common law principles. Fineg v. Pickrell, 81 Ariz. 313, 305 P.2d 455 (1956).

It is well settled under the common law that an agreement to submit all disputes which may arise to arbitration cannot oust the court of jurisdiction. Gates v. Arizona Brewing, 54 Ariz. 266, 95 P.2d 49 (1939).

> "However, once such agreement to submit is executed by the parties and is carried out to a just and final award such will not be considered invalid by the mere fact that the original agreement provides for arbitration of all disputes which may arise. [citations omitted]" 81 Ariz. at 318, 305 P. 2d at 458.

However, our Supreme Court in the *Fineg* case went on to say that one of the essentials of a valid arbitration award is that the subject matter of the dispute must be submitted to the board in such a manner as to leave "no reasonable doubt" as to what was intended to be submitted to arbitration. Fineg v. Pickrell, supra at 319, 305 P.2d 455.

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tinguished from partnership property of CHARLES JOHN FUNK consisting of the stocks in Greyhound Parks of Arizona, Inc., Washington Land Company, Inc., and bonds of Greyhound Parks of Arizona, Inc.

"That the majority award in all other respects is confirmed."

In determining what the subject matter before the arbitration board consisted of we must not only consider the stipulation of September 17, 1962, but also the long discussions entered into by the parties and their attorneys which took place at the commencement of the arbitration proceedings and from which, as a consequence thereof, the above stipulation sprang. In that discussion the following exchanges took place:

> "Mr. Bayham [Appellee's attorney]: I will be willing to sign any agreement executed jointly by myself and Mr. Primock [appellants' attorney] to the effect we will abide by the decisions of the arbitrators in connection with this arbitration, and if you decide an asset is a partnership asset, that is it, it is a partnership asset. On the other side, if you decide it isn't a partnership asset, he has to agree it is not a partnership asset, it is a two-edged sword.
>
> Mr. Primock [Appellants' attorney]: I will abide by your decision. * * * We were under the opinion that the arbitration was to determine what was in the lawsuit [that litigation begun by the appellee to force dissolution], the value to give John what he prayed for in the lawsuit, plus the co-partnership agreement and plus the December 21 letter they signed. If you find under this agreement he doesn't have to sell it [the stocks and debenture bonds received by the appellee under the bills of sale], we will abide by it. * * *
>
> Mr. Sullivan [One of the arbitrators]: What do you care whether it is in debentures or into bucks.

Charles John Funk: I go along if you decide it is a partnership asset.

* * * * *

Mr. Elsing [one of the arbitrators]: Would this be satisfactory to have a stipulation you go ahead and submit your case and any award we make can be filed in the superior court as a judgment?

Mr. Bayham: I would accept that.

Mr. Primock: With no ifs, ands or buts?

Mr. Bayham: I accept it the same as if it were a judgment determining this matter.

Mr. Primock: I will go along with that. There is one question that bothers me, I intend to introduce evidence as to the three brothers, two brothers and a nephew [appellants], getting rid of John [appellee] in his entirety, buying out the value of Greyhound Parks, Western Racing, Inc., Washington Land Company, and so forth. If this stipulation will cover all of that, I mean, the stipulation that you just gave if it is broad enough to cover all of what I am going to try to do—not that I may succeed, but if I try to do it and it is done, if it covers that, I am willing to do it. I want to end it for all times.

Mr. Bayham: Perhaps we would go farther and stipulate further that it can be filed as a judgment, the award could be as a judgment, in the action which has been mentioned.

Mr. Primock: I will go with that. The 129497, whatever award here is the judgment.

Mr. Bayham: So stipulated.

* * * * *

Mr. Primock: * * * You would agree that if they decide John keep it, he gets to keep it, if they decide he must sell it, they set the price and the terms?

Mr. Bayham: That is correct. * * *"

It can be seen from the foregoing that all of the parties, through their counsel, agreed that the board should be allowed to determine whether the stocks and debenture bonds in issue were part of the partnership assets. The stipulation of September 17, 1962, was *the* final wording by the parties of their agreement. We conclude from reading the foregoing and the stipulation that the parties agreed beyond a reasonable doubt that the stocks and debenture bonds in issue were to be submitted to the board of arbitration as proper subject matter with which the board was to deal.

Our Supreme Court, in Cracchiolo v. Carlucci, 62 Ariz. 284, 288, 157 P.2d 352, 254 (1945), in dealing with a very similar problem, found the following arbitration submission agreement to be sufficiently certain and comprehensive to support an award:

"* * * the parties have agreed to submit all controversies and difference between them to arbitration * * *."

We can find no difference between the *Cracchiolo* case, and the submission of "all controversies," and the instant case where it was stipulated that "evidence shall be introduced before the arbitrators" and where that evidence included the stocks and debenture bonds of the appellee.

An arbitration agreement may give the arbitrators full power to decide both questions of law and fact

and by submitting an entire dispute to the board of arbitration, the parties submit the law as well as the facts to the judgment of the arbitrators. 5 Am.Jur.2d, Arbitration and Award, § 58, at 563-64; Riley v. Pig'n Whistle Candy Co., 109 Cal.App.2d 650, 214 P.2d 294 (1952); and Lundgren v. Freeman, 307 F.2d 104 (9th Cir. 1962). By the sipulation of September 17, 1962, and by the partnership agreement the parties gave the board of arbitration authority to decide all matters submitted to it and that their award "shall have the same force and effect as though entered by a judge of the Superior Court * * *." The courts will or will not enforce arbitration awards depending upon their validity. However, the courts will not vary an arbitration award which is contested on the merits of the controversy submitted to the board or on the sufficiency of the evidence upon which the board bases its decision. 5 Am.Jur.2d, Arbitration and Award, § 145, at 626-27; Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal.2d 228, 229, 174 P.2d 441 (1946); and, Monte v. Southern Delaware County Authority, 335 F.2d 855 (3d Cir. 1964).

Charles John Funk in his cross appeal questions alleged irregularities in both the arbitration proceedings and the award. He contends that the majority of arbitrators have not only miscalculated in their figuring but also have acted with such misconduct as to constitute legal fraud. However, appellee cites no specific facts nor does he establish affirmative proof to support his allegations. His sole authority for his claim is his own appointed arbitrator's dissenting opinion.

We find no evidence of fraud in the record. The parties stipulated to be bound by the award. In the

absence of proof of fraud, this court holds the appellee to this arms-length agreement. Mere allegations that an award was fraudulent or inadequate are insufficient to require this court's judicial inquiry. 5 Am.Jur.2d, Arbitration and Award, § 186, at 656-67; Second Soc. of Universalists v. Royal Ins. Co., 221 Mass. 518, 109 N.E. 384 (1915).

The judgment modifying the arbitration award and judgment thereon is vacated and the original judgment on the award is affirmed.

MOLLOY and KRUCKER, *J J.*, concur.

NOTE: This cause was decided by the Judges of Division Two as authorized by A.R.S. § 12-120, subsec. E.

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In the Supreme Court of the United States

OCTOBER TERM 1968

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JUN 27 1968
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No. 305

CHARLES JOHN FUNK,
Petitioner,

vs.

DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Arizona

Brief for Respondents in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1473

CHARLES JOHN FUNK,
Petitioner,

vs.

DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Arizona

Brief for Respondents in Opposition

Respondents, David K. Funk, Arthur L. Funk and Albert C. Funk, present this Response in Opposition to the Petition for Writ of Certiorari filed herein by Petitioner, Charles John Funk.

OPINIONS BELOW

The Majority Report of Arbitrators, Arbitration Award and Dissent to Arbitration Award are unreported, but are set forth in the Petition (App. of Petition, pp. 1-34). The Judgment of the Superior Court of the State of Ari-

zona in and for the County of Maricopa on the Arbitration Award is unreported, but included in the Petition (App. of Petition, pp. 35-38).

The opinion of the Court of Appeals of Arizona (App. of Petition, pp. 39-48) is reported at 6 Ariz.App. 527, 434 P.2d 529 (1967). Denial of the Petition for Review of the decision of the Court of Appeals of Arizona by the Supreme Court of Arizona is unreported.

JURISDICTION

This Court does not have jurisdiction to grant a Writ of Certiorari in this case since the Petition was not filed within ninety days after the entry of an order denying the Petition for Review of the Arizona Court of Appeals' decision by the Supreme Court of Arizona. 28 U.S.C., § 2101(c). Otherwise, the jurisdictional requirements are set forth in the Petition, except jurisdiction of this Court must be invoked under 28 U.S.C., §1257(3) and not 28 U.S.C., § 1254(1).

QUESTION PRESENTED

The question presented for review is whether a partner in a family partnership who files a legal action asking for dissolution of the partnership and thereafter agrees to arbitrate is bound by the arbitration award, when Petitioner and his attorney agreed by stipulation, prior to the commencement of the arbitration proceeding, that the arbitrators could determine whether properties were partnership assets, and that the decision of the arbitrators could be filed in a court of general jurisdiction as a judgment in a pending legal action.

STATEMENT OF THE CASE

This litigation concerns the dissolution of a family partnership, pursuant to an arbitration clause in the partnership agreement, and an oral stipulation by the partners

through their legal representatives as to the scope of the submission to the arbitrators and the effect of an award.

In 1957, the parties hereto entered into a partnership agreement to conduct business under the name of Western Greyhound Racing Circuit. At approximately the same time Respondents, Arthur and David Funk, agreed to transfer to Petitioner by Bills of Sale stock and debentures in a corporation known as Greyhound Parks of Arizona, Inc. and stock in Washington Land Company, a corporation. Both corporations were to be owned and operated by the newly organized partnership.

Dispute arose among the partners, and Petitioner filed an action in the Superior Court of the State of Arizona in and for Maricopa County to dissolve the partnership. The partners thereafter agreed to arbitrate their differences pursuant to the partnership agreement.

Prior to receiving evidence at the arbitration hearing the following discussion and exchange transpired:

> "MR. BAYHAM (Petitioner's attorney): I will be willing to sign any agreement executed jointly by myself and Mr. Primock (Respondents' attorney) to the effect we will abide by the decisions of the arbitrators in connection with this arbitration, and if you decide an asset is a partnership asset, that that is it, it is a partnership asset. On the other side, if you decide it isn't a partnership asset, he has to agree it is not a partnership asset, it is a two-edged sword.
>
> "MR. PRIMOCK (Respondents' attorney): I will abide by your decision . . . We were under the opinion that the arbitration was to determine what was in the lawsuit (that litigation begun by the Petitioner to force dissolution), the value to give John what he prayed for in the lawsuit, plus the co-partnership agreement and plus the December 21 letter they signed. If you find under this agreement he doesn't have to sell it (the

stocks and debenture bonds received by the Petitioner under previously executed bills of sale), we will abide by it. * * *

"MR. SULLIVAN (One of the arbitrators): What do you care whether it is in debentures or into bucks.

"CHARLES JOHN FUNK: I go along if you decide it is a partnership asset.

* * * * * * * *

"MR. ELSING (One of the arbitrators): Would this be satisfactory to have a stipulation you go ahead and submit your case and any award we make can be filed in the Superior Court as a judgment?

"MR. BAYHAM: I would accept that.

"MR. PRIMOCK: With no ifs, ands or buts?

"MR. BAYHAM: I accept it the same as if it were a judgment determining this matter.

"MR. PRIMOCK: I will go along with that. There is one question that bothers me, I intend to introduce evidence as to the three brothers, two brothers and a nephew (Respondents), getting rid of John (Petitioner) in his entirety, buying out of value of Greyhound Parks, Western Racing, Inc., Washington Land Company andsoforth. (sic) If this stipulation will cover all of that, I mean, the stipulation that you just gave if it is broad enough to cover all of what I am going to try to do—not that I may succeed, but if I try to do it and it is done, if it covers that, I am willing to do it. I want to end it for all times.

"MR. BAYHAM: Perhaps we would go farther and stipulate further that it can be filed as a judgment, the award could be as a judgment, in the action which has been mentioned.

"MR. PRIMOCK: I will go with that. The 129497, whatever award here is the judgment.

"MR. BAYHAM: So stipulated.

* * * * * * * *

"MR. PRIMOCK: * * * You would agree that if they decide John keep it, he gets to keep it, if they

decide he must sell it, they set the price and the terms?

"MR. BAYHAM: That is correct. * * *"

Reporter's Transcript of Arbitration, Volume IV, Sept. 17, 1962.

Petitioner's statement of the case creates the inference that he did not agree that the arbitration board was to determine whether or not the stock and debentures of Greyhound Parks of Arizona, and the stock of Washington Land Company were part of the partnership assets of Western Greyhound Racing Circuit.

We do not deem it appropriate at this juncture to burden the Court with a detailed analysis of the evidence. It is sufficient to read the above stipulation by the partners as to the scope of the submission, which answers in full Petitioner's latent contention.

ARGUMENT

This Court does not have jurisdiction to issue a Writ of Certiorari since the application was not within the statutory time period; no federal question was specially set up or claimed; and the decision of the lower court is based upon non-federal grounds.

The decision of the Court of Appeals of Arizona on the individual facts involved was manifestly correct. The decision of the lower court does not conflict with decisions of this Court nor with any Federal or State statute. The issue in the present case is uniquely narrow, and no amount of strained semantics can convert it into a case warranting review by this Court on certiorari.

This Court Has No Jurisdiction to Decide This Case

The Supreme Court of Arizona entered an order on February 20, 1968, denying Petitioner's Petition for Review of the Arizona Court of Appeals' decision in this case. Respondents were notified by Petitioner's counsel that this

case was docketed in the Supreme Court of the United States on May 27, 1968. Total number of days lapsed between the above two dates is ninety-seven (97).

A Writ of Certiorari designed to bring a judgment before this Court in a civil action for review must be taken or applied for within ninety (90) days after entry of judgment by the highest state court. 28 U.S.C., § 2101. A party may seek review of a decision of the Arizona Court of Appeals in the Supreme Court of Arizona by a Petition for Review filed in the Supreme Court of Arizona. Rule 47(b), Arizona Rules of the Supreme Court, effective January 1, 1965.

Where the Supreme Court of Arizona had jurisdiction to review the decision of the intermediate appellate court, and refused to do so, the time for filing the Petition for Certiorari in this Court runs from the date of the refusal to review by the highest State appellate court. *American Railway Exp. Co. v. Levee,* 263 U.S. 19.

More than 90 days elapsed from the time the Supreme Court of Arizona refused review to the date the Petition for Writ of Certiorari was filed in this Court, and the period for applying for Writ of Certiorari was not extended by a Justice of this Court. Petitioner's application for a Writ of Certiorari is out of time and should be denied for this reason.

A cursory examination of the decision by the Court of Appeals of Arizona clearly indicates there was no substantial federal question specially set up or claimed in the lower court, and, thus, this Court does not have jurisdiction to review the decision. 28 U.S.C., Section 1257(3); *Zucht v. King,* 260 U.S. 174. Any alleged substantial federal question claimed to be involved now is so devoid of merit as to be frivolous.

The function of a Writ of Certiorari is not to give the complaining party another opportunity. *Magnum Import Company v. Houbigant,* 262 U.S. 159. The singular reference in the record to claimed violation of a right under the United States Constitution is found in Petitioner's Motion in Opposition to the trial court entering judgment on the Arbitration Award. But this constitutional argument was not carried through to the state appellate court by Petitioner.

The lower court's failure to mention a constitutional issue was not an oversight, but was for want of proper presentation by Petitioner. Also, the failure of the Petitioner in this case to comply with Rule 23(1)(f) of the Rules of the Supreme Court of the United States seems to support the contention that a federal question was not raised in the state appellate courts.

The fact that a federal question was presented to the trial court is not sufficient. *Beck v. Washington,* 369 U. S. 541. The constitutional issue had to be pursued on appeal, since the Arizona law is clear that unless an issue is presented on appeal, the appellate tribunal will not consider other alleged errors. *Elerick v. Rocklin,* 102 Ariz. 78, 425 P.2d 103.

The decision by the Arizona Court of Appeals was not based upon federal grounds, even assuming a federal question was involved, as there are adequate and independent non-federal reasons for the result. *Fox Film Corp. v. Muller,* 296 U.S. 207. The touchstone of decision of the lower court is the law of arbitration and contract in that the arbitrators were given the power to determine whether assets were partnership or separate property by stipulation, and the principals agreed to abide by the award. This non-federal reason is adequate to support the state court judgment.

Petitioner is asking this Court for special dispensation and a complete reversal of long-established, well-engrained rules of constitutional law in attempting to have the decision reviewed even though totally devoid of constitutional issues. This case does not present an important federal question, as from its inception to its present posture, it was and is the determination of the value of a partner's interest in a family partnership, and whether certain assets were partnership property.

The Decision Below Is Clearly Correct

The mere mumbling that a decision of the Court of Appeals of Arizona conflicts with the due process of law and impairing the obligation of contracts clauses of the United States Constitution does not present adequate reasons to grant a Writ of Certiorari. There has been an utter failure by Petitioner to demonstrate how the decision of the lower court conflicts with provisions of the United States Constitution. No application of these constitutional protections was made to the facts of this case, and to solely focalize and rely upon magical phraseology as reason for reviewing the decision is unadulterated sophistry.

Even by taking unwarranted liberties with the record, Petitioner does not make constitutional issues reviewable by this Court. There is no citation to decided cases nor reference to statutes, Federal or State, as to how this case violates due process of law or impairs the obligation of a contract. The sheer assertion of conflict is nothing more than an expedient subjective conclusion, completely unfounded and unsupported by the facts. The lack of citation of conflicting authority, and the negative application of constitutional principles to the facts of this matter, only illustrate the totally unmeritorious declaration that in some ambiguous and speculative manner Petitioner's constitutional rights have been violated.

It is well-established that individual property rights are protected by the United States Constitution. Petitioner's reliance upon the case of *Dombrowski v. Eastland,* 387 U.S. 82, is, however, pellucidly misplaced. The holding of this Court in that case was that a sufficient factual dispute was present to negate the granting of summary judgment by the lower court as to acts by an attorney employed by the Internal Security Subcommittee of the Judiciary Committee of the United States Senate. The case is obviously based jurisdictionally on the Federal Civil Rights Act of 1871 as indicated in its parent case, *Dombrowski v. Pfister,* 380 U.S. 479. The holding in the former case is completely out of point since it has nothing to do with individual property rights. The Fourth Amendment right to be free from "unreasonable searches and seizures" was involved, and the cited cases involve a Federally created statutory right of civil action for violation thereof.

Contrary to Petitioner's suggestion that the decision conflicts with other decisions of this Court, an examination of cases decided by this Court, regarding the subject of arbitration, reveals that the decision below follows general principles of arbitration, not only relied upon by this Court, but other State and Federal courts in the United States as well.

As early as 1870, this Court in the case of *Smith v. Morse,* 9 Wall. 76, stated:

> "... So the agreement to submit the matter to arbitrators, and to an umpire, if needful, carried with it the further agreement to abide the award which they might render, or, in case of their disagreement, which he might render. The law implies an agreement to abide the result of an arbitration from the fact of submission."

This Court has expounded other principles regarding arbitration which are applicable in the instant case. Judicial review of an arbitration award is much more narrow than judicial review of a trial, *Wilko v. Swan*, 346 U.S. 427; and, since arbitrators do not have judicial instructions on law available to them, they do not have to give reasons for their decisions. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198. Where parties mutually agree to be bound by the decision of arbitrators, such an agreement is binding on the parties to the extent agreed upon. *Gordon v. United States*, 7 Wall. 188.

The submission of a claim to arbitration may be pursuant to an agreement, and the principles of common law are applicable since arbitration does not have to result from statute or rule of court. The submission is an agreement, and assuming capacity to contract, the law governing contracts is applicable. *District of Columbia v. Bailey*, 171 U.S. 161.

It is no longer an open question that where parties agree to submit a controversy to arbitration and explicitly delineate the matters subject to arbitration by a submission agreement, the decision by the arbiters, absent fraud, corruption, or gross mistake, is binding. *Marine Transit Corporation v. Dreyfus*, 284 U.S. 263; *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109; *United States v. Justice*, 14 Wall. 535.

It is impossible to escape the conclusion, after reading the quoted stipulation agreed to by Petitioner's counsel, that the course of action presently being pursued by Petitioner is not the result of an afterthought.

This case involves essentially the construction of the declaration of submission to the arbitrators by the parties. Petitioner's contention that the stocks and bonds were

separate, non-partnership assets is totally refuted by the record. The character of the stocks and bonds was the precise subject of arbitration. It was the duty of the arbitrators to ascertain whether these assets were encompassed in the family partnership to such an extent as to make it impossible or impractical to effectively separate them from other partnership assets. This is what occurred; the award was within the scope of the submission; and, as such, the decision of the arbitrators is final, not reviewable by the judiciary for mistakes, either of law or of fact, absent fraud, collusion or plain error. *Cf. The N. Y. and Cumberland Railroad Co. v. Myers*, 18 How. 246.

Petitioner would have this Court grant his Petition for a Writ of Certiorari on the premise that the decision is of major significance in the administration of arbitration proceedings and that society has a substantial right involved or interest in the outcome thereof. Again, a bold generalization is asserted which cannot withstand scrutiny and minimal examination.

This court has often stated that it will not grant a Writ of Certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220. The issues decided by the arbitrators were factual determinations of whether the stocks and bonds owned by the parties were partnership assets; the value of Petitioner's share of the stocks and bonds of the corporations; and the value of Petitioner's partnership interest. It is equally clear that the judgment of the arbitrators is confined to the limited arbitration proceedings between the parties hereto, and the Court of Appeals of Arizona found that Petitioner had agreed to submit the ownership of the stocks and bonds to the arbitrators; had agreed by stipulation that the arbitration award could be entered as a judgment; and had agreed to abide by the

arbitration award. The issue of fraud was considered by the Court of Appeals of Arizona and not found present in this case since Petitioner had not shown with specificity those acts constituting fraud. It is difficult to imagine how the peripheral and particular set of facts involved in this case will arise in many arbitration proceedings in the United States.

The limited issue decided in this case is not converted into a burning social question by the injection of all arbitration proceedings into the argument, and does not transform a correct decision in a simple arbitration case into an important question of national interest.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Date: June 24, 1968

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SUPREME COURT, U. S.

FILED
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IN THE

Supreme Court of the United States

October Term, 1968

No. 135

CHARLES JOHN FUNK,

Petitioner,

vs.

DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK,

Respondents.

REPLY BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 1473

CHARLES JOHN FUNK,

Petitioner,

vs.

DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK,

Respondents.

REPLY BRIEF.

ARGUMENT.

Respondents' brief raises two issues, *i.e.* Jurisdiction of this court and the Law of Arbitration.

The respondent claims the petition herein was not filed within ninety (90) days as required by 28 U.S.C., Sec. 2101. We submit that the petition was presented to the office of the Clerk of this court on the ninetieth day, though it was not docketed until the ninety seventh day. It is the date of presentation of the petition for certiorari to the Clerk of this court that controls and not the date the petition is docketed.

Respondents next argue that petitioner did not set up or claim a federal question in the court below.

This matter was presented to the arbitrators as evidenced by the Dissent to Arbitration Award set forth

at pages 22 through 24 of the appendix to the petition filed herein, wherein the question of due process is clearly set forth.

The judgment on arbitration award set forth at pages 35 through 38 of the appendix to the petition filed herein shows the trial court recognized the due process question by amending the arbitration award.

It is true that this question was not specifically presented to the court of appeals. Why should it be? Petitioner was the appellant in the appellate court of the State of Arizona. The trial court had found that the part of the arbitrators award was erroneous and had entered judgment accordingly. Petitioner certainly was not in a position to appeal from a portion of the judgment which was in his favor.

Petitioner's appeal was based solely upon what he considered to be erroneous computations by the arbitrators in arriving at the amount of money to be awarded to him.

The respondents filed a cross-appeal alleging error by the trial court in modifying the arbitration award by deleting therefrom the property of petitioner involved herein.

Petitioner did in his reply brief in the Court of Appeals of Arizona point out the Dissent to arbitration award and the non-due process nature of the arbitration hearing. See page 9, appellants' reply brief in the Court of Appeals, Division One, State of Arizona.

Petitioner in his petition for rehearing filed with said Court of Appeals after its decision was handed down, argued this due process question to the court.

This was presented to the Supreme Court of Arizona by the petition for review filed with it. There are

numerous cases where the question of due process may only come into being by virtue of the decision of the court.

See for example:

Williams v. Tooke, 108 F. 2d 758, Certiorari denied 61 S. Ct. 8, 311 U.S. 655, 85 L. Ed. 419.

The real question presented in this petition for certiorari is the authority of arbitrators.

If one is to adopt the theory of respondents that once you agree to arbitration you are bound by anything the arbitrators do, then a board of arbitration is given the authority to exceed constitutional limits with impunity, an authority not exercised by the courts of this country.

Such is not true and cannot be true.

The cases cited by respondents recognize some limitation on the arbitrators.

See *Gordon v. United States,* 7 Wall. 188, cited at page 10 of respondents' brief.

The doctrine is that one is bound to the extent agreed upon. When one agrees to arbitration and in his agreement you may decide question A, there is inherent in such agreement that the arbitrators can decide that question only if there is evidence submitted from which such a determination can be made.

As stated at page 33 of Arbitration in Action, by Francis Keller:

> "* * * The parties therefore, have a right to expect a decision which determines their respective claims on the basis of the evidence submitted. * * *"

Thus petitioner is not asking for a review of the evidence as respondents would like the court to believe.

What petitioner is asserting is that an award which exceeds the authority of the arbitrators and takes property from a party thereto, is a denial of due process of law and must be struck down.

Conclusion.

We respectfully submit that the petition for certiorari filed herein was timely filed, raises a clear question of federal constitutional law, and the court should grant the same.

Respectfully submitted,

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Attorneys for Petitioner.